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The Supreme Court's Interpretation of Section 1988 and Awards of Attorney's Fees for Work Performed in Administrative Proceedings: A Proposal for a Result-Oriented Approach—North Carolina Department of Transportation v. Crest Street Community Council, Inc., 107 S. Ct. 336 (1986)

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THE SUPREME COURT'S INTERPRETATION OF SECTION 1988 AND AWARDS OF ATTORNEY'S FEES FOR WORK PERFORMED IN ADMINISTRATIVE PROCEEDINGS: A PROPOSAL FOR A RESULT-ORIENTED APPROACH—*North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, 107 S. Ct. 336 (1986).

In 1976, Congress enacted the Civil Rights Attorney's Fees Awards Act, amending 42 U.S.C. § 1988.[1] Section 1988 authorizes courts to award attorney's fees to claimants who prevail in actions or proceedings to enforce civil rights under any of the laws enumerated in the Section.[2]

In *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, the United States Supreme Court for the first time addressed the issue of whether a party may seek attorney's fees in a court action apart from the action or proceeding in which the party seeks to enforce civil rights.[3] Justice O'Connor, writing for the six-member majority, concluded that pursuant to an interpretation of the legislative history and the "plain language" of section 1988, a court may award attorney's fees only in a court action to enforce a substantive civil rights statute.[4] An independent action for attorney's fees may not, therefore, be asserted apart from a civil rights action.[5]

Because the Court decided *Crest Street* based solely on whether an independent action for attorney's fees is permissible, it did not discuss the availability of attorney's fees awards under Section 1988 for negotiations

1. Pub. L. No. 94-559, 90 Stat. 2641 (1976).

2. 42 U.S.C. § 1988 (1981). The statute states:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1985 and 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. §§ 1681 et seq., 42 U.S.C. §§ 2000c, 2000c-6, 2000c-9, 2000h-2] . . . or title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

See *infra* note 26 for text of remainder of Section 1988.

3. 107 S. Ct. 336 (1986). In the earlier case of Pennsylvania v. Delaware Valley Citizens' Council, 106 S. Ct. 3088, 3096 n.5 (1986), the Court specifically declined to address this question. ("We express no judgment on the question of whether an award of attorney's fees is appropriate in federal administrative proceedings when there is no connected court action in which fees are recoverable.").

4. *Crest Street*, 107 S. Ct. at 341.

5. The Court attempted to resolve a split among circuits regarding the permissibility of such independent actions under Section 1988. The Eighth Circuit in Horacek v. Thone, 710 F.2d 496, 499 (8th Cir. 1983), and the Eleventh Circuit in Estes v. Tuscaloosa County, 696 F.2d 898, 901 (11th Cir. 1983), have held that a fee award for work done at the administrative level was improper absent the plaintiff's filing of a lawsuit alleging substantive civil rights violations. The Fourth Circuit in Crest St. Community Council, Inc. v. North Carolina Dep't of Transp., 769 F.2d 1025, 1034 (4th Cir.1985), *rev'd*, 107 S. Ct 336 (1987), held that plaintiffs may file suit in district court to recover attorney's fees even if their complaint alleges only that they are entitled to an award of fees.

subsequent to the filing of an administrative complaint.[6] The problems arising from an analysis which focuses exclusively on the permissibility of independent actions, however, outweigh its utility. This Note analyzes administrative proceedings and negotiations connected with civil rights violations in light of the legislative history and judicial interpretations of Section 1988. That analysis leads to the conclusion that administrative activities are proceedings to enforce civil rights which should give rise to a court award of attorney's fees under Section 1988. The Note suggests a test, based on the results obtained, for determining when a plaintiff in such proceedings should be entitled to an award of attorney's fees, without the artificial limitation of procedural barriers.

I. ATTORNEY'S FEES AND CIVIL RIGHTS ACTIONS PRIOR TO *CREST STREET*

A. *Attorney's Fees Under Section 1988*

Section 1988 explicitly authorizes fee awards to plaintiffs who prevail in actions or proceedings to enforce any of several federal civil rights laws enumerated in the statute.[7] These laws previously contained no provisions for the shifting of attorney's fees. Section 1988 creates only two requirements for an award of fees: One, the plaintiff must be a prevailing party, two, in an action or proceeding to enforce civil rights.[8]

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6. *Crest Street*, 107 S. Ct. at 340.

7. *See supra* note 2 for full text of the amendment. Prior to 1975, courts awarded fees in suits brought under Reconstruction-era civil rights laws on the theory that victorious plaintiffs acted as "private attorneys general" whose vindication of civil rights benefitted all citizens. *See, e.g.*, Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968). Then, in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), the Supreme Court held that federal courts do not have the power to award attorney's fees to a prevailing party unless an act of Congress specifically provides for such an award. Although *Alyeska* involved environmental law questions, the Court expressly disapproved of the awarding of attorney's fees to victorious civil rights plaintiffs under the "private atttorney general" theory. *Id.* at 271. Congress reacted quickly to *Alyeska;* the legislative history reveals that "[t]he purpose of this amendment is to remedy anomolous gaps in our civil rights laws created by the United States Supreme Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society [citation omitted] and to achieve consistency in our civil rights laws." S.REP. NO. 1011, 94th Cong., 2d Sess. 1, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5909.

Congress was also motivated by a desire to make statutory the private attorney general theory. *See* SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 94 CONG., 2D SESS., CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 SOURCE BOOK. LEGISLATIVE HISTORY, TEXTS AND OTHER DOCUMENTS, 23 (1976) (statement of Senator Kennedy) (the amendment to Section 1988 "is intended simply to expressly authorize the courts to continue to make the kinds of awards of legal fees that they had been allowing prior to the Alyeska decision").

8. See *supra* note 2 for full text of the relevant portion of Section 1988; *see also* New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 61 (1980) ("The question presented is whether, in the words of the statute, respondent was the 'prevailing party' in an 'action or proceeding'. . . ."); NAACP v.

In amending Section 1988, Congress recognized that in many cases victims of civil rights violations would lack the financial resources to obtain adequate legal representation for their claims.[9] Absent a way to attract counsel to represent such impecunious plaintiffs, civil rights laws would become hollow pronouncements.[10] Congress hoped that the fee shifting provisions of Section 1988 would provide a sufficient guarantee of compensation to induce attorneys to take on civil rights cases when they would not otherwise do so.[11]

Congress intended to make reasonable attorney's fees available to any person with a meritorious civil rights claim.[12] Although the Section gives courts a large degree of discretion in awarding attorney's fees, Congress noted with approval the Supreme Court's statement in a pre-Section 1988 case that a party who has successfully enforced civil rights should "ordinarily recover an attorney's fee unless special circumstances would render an award unjust."[13] Furthermore, while Section 1988 plainly authorizes a fee award for a party who prevails in a full trial on the merits,[14] Congress also stated that prevailing parties should not be penalized for seeking nonjudicial forms of redress for civil rights violations.[15] Congress thus contemplated that a fee award would be proper where plaintiffs vindicate civil rights through out-of-court settlements or other types of informal relief.[16]

Wilmington Medical Center, Inc., 689 F.2d 1161, 1170 (3d Cir. 1982), *cert. denied*, 460 U.S. 1052 (1983).

9. S. REP. No. 1011, *supra* note 7, at 2.

10. *Id.* (citing Hall v. Cole, 412 U.S. 1, 13 (1973)).

11. *See* H. R. REP. No. 1558, 94th Cong., 2d Sess., 9 ("awarding counsel fees to prevailing plaintiffs in such [civil rights] litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected"); *see also* Evans v. Jeff D., 106 S.Ct. 1531, 1554–55 (1986) (Brennan, J., dissenting) ("The *congressional* policy underlying the Fees Act is . . . to create incentives for lawyers to devote time to civil rights cases by making it economically feasible for them to do so.") (emphasis in original).

12. H. R. REP. No. 1558, *supra* note 11, at 9.

13. *Id.* at 6 (citing Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968)). Prevailing defendants are usually not eligible for an award of attorney's fees; they may recover fees only if the plaintiff's action is "vexatious and frivolous" or if the plaintiff's intent in initiating the action was solely to harrass or embarrass the defendant. *Id.* at 7. *See generally* Note, *Promoting the Vindication of Civil Rights Through The Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346, 353–54 (1980).

14. H. R. REP. No. 1558, *supra* note 11, at 7.

15. *Id.*

16. *Id.; see also* Maher v. Gagne, 448 U.S. 122, 129 (1980) ("The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees."). Although the legislative history is silent on the matter, the Supreme Court has required that the settlement or informal relief follow the filing of a law suit alleging civil rights violations. *See infra* notes 50–60 and accompanying text.

B. Recent Supreme Court Interpretation of Section 1988

The Supreme Court has recognized the importance of vigorous and expeditious enforcement of civil rights laws[17] and the role played by Section 1988 in that enforcement.[18] Nevertheless, the Court has reasoned that Congressional intent is best served by denying claims for attorney's fees in some instances. In *Webb v. Board of Education*[19] the Court held that though Section 1988 authorizes a fee award for counsel's efforts to represent clients in mandatory administrative proceedings,[20] a fee award is improper where the administrative proceedings are optional.[21] Moreover, despite Congress' intent to award attorney's fees to claimants who settle out of court,[22] recent Supreme Court holdings have restricted the ability to obtain fees when claimants settle civil rights disputes.[23]

17. *See, e.g.*, Evans v. Jeff D., 106 S. Ct. 1531, 1546 (1986) (Brennan, J. dissenting) ("Ultimately, enforcement of the [civil rights] laws is what really counts.").

18. *Id.* at 1539 ("[I]t is undoubtedly true that Congress expected fee-shifting to attract competent counsel to represent citizens deprived of their civil rights . . . .").

19. 471 U.S. 234 (1985).

20. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 60 (1980). The plaintiff in *Carey* filed suit pursuant to Title VII of the Civil Rights Act of 1964, which prohibits employers from engaging in discriminatory hiring practices. 42 U.S.C. § 2000e (1981). Section 706(c) of Title VII requires claimants to participate in state-level administrative proceedings following the initial filing of the complaint with the Equal Employment Opportunity Commission. 42 U.S.C. § 2000e-5(c). The Court in *Carey* reasoned that since Title VII had a "strong preference" for administrative resolutions of employment discrimination complaints the claimant should be compensated for work done at the administrative level. *Carey*, 447 U.S. at 60.

21. 471 U.S. at 242–44. In *Webb*, the plaintiff filed a complaint alleging violations of several of the civil rights statutes enumerated in Section 1988, including 42 U.S.C. § 1983. *Webb*, 471 U.S. at 236. The Court refused to compensate the plaintiff's counsel for efforts made at the administrative level to settle the dispute; the court argued that "[a]dministrative proceedings to enforce . . . rights created by state law simply are not any part of the preceedings to enforce § 1983." *Id.* at 236; *see also infra* notes 91, 94–96 and accompanying text.

22. *See infra* note 56 and accompanying text.

23. *See, e.g.*, Evans v. Jeff D., 106 S. Ct. 1533, 1543 (1986). There, the Court upheld the terms of a settlement which required the plaintiff to waive his statutory right to assert a subsequent claim for attorney's fees. The Court reasoned that its holding encouraged the enforcement of civil rights since defendants will be less likely to settle if the question of their liability for the plaintiffs' attorney's fees remains open. *Id.* at 1542. However, the Court also realized "the possibility that decisions by individual clients to bargain away fee awards may, in the aggregate and in the long run, diminish lawyers' expectations of statutory fees in civil rights cases" and that "the pool of lawyers willing to represent plaintiffs in such cases might shrink . . . ." *Id.* at 1545 n.34; *see also* Marek v. Chesny, 473 U.S. 1, 12 (1985) (the Court held that when plaintiffs reject a settlement offer which proves to be greater than the award of damages obtained at trial, the plaintiffs are not entitled to recover costs, including attorney's fees; the Court reasoned that its holding encouraged civil rights plaintiffs to accept reasonable offers of settlement, thereby sparing them the burden of stressful and time consuming litigation).

The Court's decision in *Crest Street* to deny the Council attorney's fees is in line with the trend evident in recent cases restricting claimants' ability to obtain fees. But see City of Riverside v. Rivera, 106 S. Ct. 2686 (1986), where the Court upheld an attorney's fee award which exceeded the damages the plaintiff recovered in the civil rights action.

C. *Precedent Analyzing Independent Actions for Attorney's Fees*

Courts have struggled with the possible justifications for allowing or rejecting an independent suit to recover attorney's fees.[24] The reasoning of these courts is generally not on solid theoretical ground. For example, to support its conclusion that Section 1988 does not create an independent action to collect attorney's fees, the Eighth Circuit[25] relied heavily on two Supreme Court cases which dealt with whether Section 1988 creates a substantive cause of action, not whether it creates an independent action for attorney's fees.[26]

Courts endorsing an independent action to collect an award of attorney's fees have likewise misinterpreted precedent. The court of appeals' decision in *Crest Street*[27] relies on *New York Gaslight Club, Inc. v. Carey*[28] to support the proposition that an independent action should be allowed.[29]

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24. *See infra* notes 25–31 and accompanying text.

25. *See* Horacek v. Thone, 710 F.2d 496, 499 (8th Cir. 1983); *see also* Derheim v. Hennepin County Bureau of Social Servs., 524 F. Supp. 1321, 1325 (D. Minn. 1981), *affd,* 688 F.2d 66 (8th Cir. 1982) ("By its terms [Section 1988] does not contemplate an independent action solely to recover attorney's fees.").

26. The first case, Moor v. County of Alameda, 411 U.S. 693 (1973), was decided prior to the amendment to Section 1988. *Moor* did not deal with an award of attorney's fees but rather with whether Section 1988 created a substantive civil rights action. *Id.* at 698–710. That is not the issue behind the question of whether Section 1988 authorizes an independent cause of action. An award of attorney's fees is an issue which arises only after the plaintiff has vindicated a substantive civil right. *See* White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 451–52 (1982).

The Court decided the second case, Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978), after Section 1988 was amended. The Court in *Monell* noted only that Section 1988 does not provide a cause of action where Section 1983 does not otherwise provide one. *Id.* at 701 n.66.

Section 1988 provides that civil rights litigation is to be disposed of according to federal law, but where federal law is "not adapted to the object, or [is] deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law . . . of the state wherein the court having jurisdiction . . . is held, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ." 42 U.S.C. § 1988 (1981).

27. Crest St. Community Council, Inc. v. North Carolina Dep't of Transp., 769 F.2d 1025, 1029–30 (4th Cir. 1985), *rev'd,* 107 S. Ct. 336 (1987).

28. 447 U.S. 54 (1980).

29. Justice Brennan's dissenting opinion in *Crest Street,* 107 S. Ct. at 344–45, also relied on the same passages in *Carey.*

The *Crest Street* dissent also relied on an earlier Court decision, White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445 (1982), to support its argument that an independent action to collect attorney's fees is permissible. The dissent's reliance on *White* rests on shaky ground. The Court's opinion in that case noted that a request for attorney's fees raised issues collateral to the main cause of action, and that "regardless of when attorney's fees are requested" a court's decision of entitlement to fees will involve a decision separate from a decision on the merits. *Id.* at 451–52. This observation sheds no light on the issue of whether the same court must consider both questions. Indeed, the *Crest Street* majority relied on the same passage to support its conclusion that an independent action for attorney's fees was not mandated by Section 1988. *Crest Street,* 107 S. Ct. at 341.

Despite the presence of some supportive dicta in the case,[30] Justice Stevens' concurring opinion in *Carey* emphasized that the litigation which resulted in the fee award dealt with the merits of the civil rights claim and was not concerned with the determination of attorney's fees.[31]

II. *NORTH CAROLINA DEPARTMENT OF TRANSPORTATION v. CREST STREET COMMUNITY COUNCIL, INC.*

A. *Facts*

The Crest Street Community Council is composed of residents of an established and predominantly black area of Durham, North Carolina. In 1976, the Council retained the North Central Legal Assistance Program to represent it in opposing the proposed extension of a highway through their neighborhood by the North Carolina Department of Transportation (N.C.D.O.T.).[32] Because the highway was funded largely by the federal goverment, N.C.D.O.T. was subject to the provisions of Title VI of the Civil Rights Act of 1964.[33] This Title prohibits any program or activity receiving federal financial assistance from discriminating on the basis of race, color, or national origin.[34] Federal Department of Transportation (D.O.T.) regulations provide that any person who believes himself to be subject to the type of discrimination prohibited by Title VI can file a complaint with the D.O.T.[35]

Since 1973, construction of the highway extension had been enjoined by an order entered in an earlier action brought under federal environmental, transportation and highway statutes (the "ECOS action").[36] In September

30. *Carey*, 447 U.S. at 66.

31. *Id.* at 71 (Stevens, J., concurring) ("[I]t is useful to emphasize that this federal litigation was commenced in order to obtain relief for respondent on the merits of her basic dispute with petitioners and not simply to recover attorney's fees.") Justice Stevens also concluded that it was "doubtful" whether Congress intended to authorize a separate action solely to recover attorney's fees. *Id.*

32. *Id.* at 338.

33. *Id.*

34. 42 U.S.C. § 2000d (1981). Title VI states: "No person in the United States shall, on the ground of race, color, or natural origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

35. 49 C.F.R. § 21.11(b) (1986) provides that "[a]ny person who believes himself or any specific class of persons to be subjected to discrimination prohibited by [Title VI] . . . may . . . file with the Secretary a written complaint."

36. ECOS, Inc. v. Brinegar, No. C-532-D-72, slip op. (M.D.N.C. Feb 20, 1973). The plaintiffs in *ECOS* were a group of Duke University students and two residents of Durham, North Carolina. The action alleged violations of the public hearing requirement and the preservation of parkland requirements of the Federal-Aid Highway Act, 23 U.S.C. §§ 128, 138, the parkland preservation policy of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f), and the National Environmental Policy Act of 1969, 42 U.S.C. § 4332. *See also* Crest St. Community Council, Inc. v. North Carolina Dep't of Transp., 769 F.2d 1025, 1027 n.5 (4th Cir. 1985), *rev'd*, 107 S. Ct. 336 (1987).

of 1978, the Crest Community Council filed an administrative complaint based on the proposed highway extension with N.C.D.O.T.[37] Following a determination by the D.O.T. that the proposed highway extension would constitute a prima facie violation of Title VI, D.O.T. urged N.C.D.O.T. to attempt to negotiate a resolution to the controversy.[38]

In August of 1982, N.C.D.O.T. moved to dissolve the ECOS injunction in district court.[39] While this motion was pending, Crest Street Community Council moved to intervene in the ECOS action and filed a proposed complaint in the court alleging violations of Title VI by N.C.D.O.T.[40] The Council and N.C.D.O.T. subsequently reached a settlement agreement[41] which the district court approved by entering a consent judgment in N.C.D.O.T.'s action and dismissing the Council's Title VI claims.[42] The court entered the consent judgment prior to ruling on the Council's motion to intervene.[43]

The terms of the settlement between the Council and N.C.D.O.T. expressly left open the issue of liability for attorney's fees.[44] Virtually all of counsel's efforts to vindicate the client's civil rights occurred prior to the filing of a motion to intervene and the proposed complaint alleging civil rights violations.[45] These efforts reaped substantial benefits not only for the

37. The complaint alleged that the N.C.D.O.T.'s proposed highway extension violated Title VI of the Civil Rights Act of 1964. *Crest Street*, 107 S. Ct. at 338.

38. *Crest Street*, 107 S. Ct. at 388. 49 C.F.R. § 21.11(c) (1986) requires the Secretary of Transportation to make a "prompt investigation" of any complaint filed which "indicates a possible failure to comply" with Title VI or the D.O.T. regulations promulgated to effectuate Title VI. The D.O.T. determined that the proposed highway extension would violate 49 C.F.R. § 21.5(b)(3). The regulation provides that "[i]n determining the site or location of facilities, a recipient [of federal funds] . . . may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin . . . ."

39. *Crest Street*, 107 S. Ct. at 339.

40. *Id.*

41. *Id.*

42. Under the terms of the Final Mitigation Plan, the Council agreed to withdraw its administrative complaint provided that the city of Durham and N.C.D.O.T. mitigate the detrimental impact of the highway extension on the Crest Street community. N.C.D.O.T. agreed to relocate the highway right of way and to modify a planned interchange so as to preserve the community church and park. Furthermore, a new community center was slated for development. This would allow the Crest Street community to remain intact while at the same time improving the quality of housing, streets, and recreational facilities. *Crest Street*, 769 F.2d at 1028.

43. *Crest Street*, 107 S. Ct. at 339.

44. *Id.*

45. *Id.* Only 37 of the over 12,000 hours of work done by respondent's counsel were related to the judicial complaint filed in the ECOS action. *Id.* at 339. Instead, virtually all of the work was done prior to the filing of the complaint. *Id.* at 342 n.1. In a "typical" case involving Section 1988, claimants file judicial complaints at an early stage, prior to attempts to settle the dispute informally. *See, e.g.*, Maher v. Gagne, 448 U.S. 122, 124–26 (1980). The Supreme Court has had little difficulty justifying a fee award in this situation. *Id.* at 132–33.

particular client but also for citizens unconnected with the dispute.[46]

The Council filed a motion for attorney's fees from N.C.D.O.T. in district court and the court granted N.C.D.O.T.'s motion for summary judgment.[47] The court of appeals subsequently reversed, holding that Section 1988 allowed an independent action for fees.[48] The Supreme Court then granted certiorari.[49]

B. *The* Crest Street *Holding*

The Court held that a plain reading of Section 1988 dictated that Crest Street Community Council could not assert its claim to attorney's fees in an action separate from a substantive civil rights action.[50] The Court paraphrased Section 1988 to state that a court may award attorney's fees only in "the action or proceeding" to enforce one of the substantive civil rights laws enumerated in Section 1988.[51] Therefore, plaintiffs must raise any claim to attorney's fees in the same action as the allegations of civil rights violations and may not assert such a claim in a separate, subsequent action. Because the Title VI allegations in the Council's proposed complaint were dismissed under the terms of the consent decree, the later action for fees was independent of any action to enforce civil rights.[52] The Council therefore was not entitled to attorney's fees under Section 1988.[53]

Moreover, the Court stated that actions to recover attorney's fees for work performed in administrative proceedings are not permissible unless the plaintiff has at a minimum filed a judicial complaint in court.[54] The Court emphasized that an award of attorney's fees depended "not only on the results obtained, but also on what actions were needed to achieve those results."[55] The Court cited several cases relied on by Congress in constructing Section 1988[56] and concluded that it was consistent with Congressional

46. Justice O'Connor remarked that the result of counsel's "diligent labor was both substantial and concrete." *Crest Street*, 107 S. Ct. at 339.

47. Crest St. Community Council, Inc. v. North Carolina Dep't of Transp., 598 F. Supp. 258, 267 (M.D.N.C. 1984), *rev'd*, 769 F.2d 1025 (4th Cir. 1985), *rev'd*, 107 S. Ct. 336 (1986).

48. *Crest Street*, 769 F.2d at 1034.

49. *Cert. granted*, North Carolina Dep't of Transp. v. Crest St. Community Council, Inc., 106 S. Ct. 784 (1986).

50. *Crest Street*, 107 S. Ct. at 340; see *supra* note 2 for text of the amendment to Section 1988.

51. *Id.* This is an erroneous paraphrasing of the statute. *See infra* notes 70–71 and accompanying text.

52. *Id.* at 342.

53. *Id.*

54. *Id.* at 340.

55. *Id.*

56. *Id.* at 340–41. The court reasoned that because the cases cited in H. R. REP. No. 1558, *supra* note 11, at 7, all involved instances where plaintiffs had filed judicial complaints previous to obtaining an out-of-court settlement, Congress intended to limit fee awards pursuant to settlements to that

intent and "entirely reasonable" to limit the award of attorney's fees to those parties who found it necessary to file a complaint in court.[57] The Court recognized dicta in two of its earlier cases[58] dealing with attorney's fees under Section 1988 which suggested that an independent action to collect attorney's fees might be warranted by Section 1988. The Court concluded that such dicta resulted from a misinterpretation of the statute and that Congress did not write the statute to provide for such an "anomalous" result.[59] In rejecting the claim for an award of attorney's fees, the Court stated that its holding created incentives for defendants to settle civil rights disputes before trial rather than risk liability for attorney's fees in litigation.[60]

III. ANALYSIS OF THE *CREST STREET* DECISION

In *Crest Street* the Court focused on the procedural steps taken by civil rights victims. The Court held that to receive fees a plaintiff must at a minimum file a court action alleging civil rights violations. The Court therefore did not discuss the underlying substantive issue presented by the case—whether civil rights victims should obtain fees when they prevail in administrative negotiations before filing a civil rights action in court. By instead imposing procedural prerequisites on an award of attorney's fees, the Court has weakened the ability of Section 1988 to serve as a mechanism to encourage vigorous private enforcement of the United States' civil rights laws.

A. *Criticism of the* Crest Street *Holding Rejecting Independent Actions for Attorney's Fees*

The *Crest Street* holding that claimants may not bring an independent action for attorney's fees is subject to criticism on several grounds. First,

situation. However, Congress made no explicit mention of such a limitation; Congress stated without qualification that "for purposes of the award of counsel fees parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. REP. NO. 1011, *supra* note 7, at 5. *See generally* E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES 62–68 (1981). Prevailing parties are usually entitled to an award of statutory attorney's fees. Newman v. Piggie Park Enters., 390 U.S. 400 (1968).

57. *Crest Street*, 107 S.Ct. at 341.

58. *See* White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 451–52 (1982) (a decision to award attorney's fees under Section 1988 involves an inquiry separate from the decision on the substantive civil rights claims); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 66 (1980) (Title VII permits a suit solely for the purpose of obtaining attorney's fees under Section 1988 for legal work done in state and local administrative proceedings).

59. *Crest Street*, 107 S.Ct. at 341.

60. *Id.* at 342. This reasoning is reminiscent of that in Evans v. Jeff D., 106 S. Ct. 1533, 1542 (1986). *See supra* note 23 and accompanying text.

the Court's holding is unsupported by the language of Section 1988 and by congressional intent in amending it. Moreover, the disallowance of independent actions for fees will result in undue burdens on both claimants and courts. Finally, the Court's reasoning is based on an erroneous paraphrasing of the statute.

1. Inconsistency with the Language and Purpose of Section 1988

Section 1988 erects only two barriers to an award of attorney's fees. Claimants must be prevailing parties, and they must have prevailed in an action or proceeding to enforce civil rights.[61]

Nothing in the language of or the legislative history of the Section 1988 mandates that a plaintiff file a substantive civil rights action in district court to obtain an award of attorney's fees for work done in administrative proceedings. In fact, such a construction of the statute directly contravenes Congress' express intent to provide attorney's fees to claimants who vindicate civil rights out of court.[62]

The Court's reasoning is grounded in the assumption that administrative proceedings have no independent status as proceedings to enforce civil rights and are merely ancillary to and subordinate to an eventual court action.[63] This assumption is unsupported by the language and legislative history of Section 1988. Indeed, it directly contradicts the section's language, which specifically provides for the award of fees in "proceedings" to enforce civil rights.[64]

2. Increased Burden on Courts and Claimants

The Supreme Court's decision in *Crest Street* will increase the burden on district courts by causing a chilling effect on the use of administrative procedures alone to vindicate civil rights. Dissallowance of independent actions may result in a procedure whereby counsel will file a protective

61. See *supra* note 2 for text of the amendment to Section 1988.

62. *See* H. R. REP. NO. 1558, *supra* note 11, at 7.

63. The Court stated "It is entirely reasonable to limit the award of attorney's fees [under Section 1988] to those parties who, in order to obtain relief, found it necessary to file a complaint in court." *Crest Street*, 107 S. Ct. at 341.

The categorization of administrative proceedings as a component part of a court action also renders the use of the term "proceedings" in Section 1988's "action or proceeding" clause meaningless. *See infra* notes 74–76 and accompanying text.

64. See *supra* note 2 for the text of the amendment to Section 1988.

action in court, obtain a stay on the action, and then proceed to the administrative forum.[65] Nevertheless, even this procedure will not preserve a right to a fee award for optional administrative proceedings, because the Court has held that these proceedings are not compensible because they do not perform an integral function in the enforcement of civil rights.[66] The clogging of district court dockets with actions that could have been resolved solely at the administrative level is a predictable by-product of the Court's rejection of independent actions to collect attorney's fees.

In addition, by discouraging out-of-court settlements, the Court's reasoning also creates a hardship for civil rights victims. It is not unreasonable to assume that counsel for civil rights plaintiffs, who must in many instances rely on the fee-shifting provisions of Section 1988 for their compensation, will forgo informal dispute resolution options in favor of proceeding straight to court.[67] The clogged court dockets may result in lengthy delays for plaintiffs seeking redress; in many instances an administrative agency could have provided the relief sought by the plaintiff. There is no basis for rejecting the general judicial policy favoring pre-trial settlements[68] in civil rights litigation.[69]

65. *Crest Street*, 107 S. Ct. at 346 n.5 (Brennan, J., dissenting). Thus, counsel will simultaneously pursue administrative and judicial remedies where the administrative agency alone could grant the relief sought by the claimant. Justice Brennan noted that this procedure is "wasteful and not required by the statutory language." *Id.*

66. *See supra* notes 19–21 and accompanying text; *see also infra* note 91.

67. The *Crest Street* majority argued that "competent counsel will be motivated by the interests of the client to pursue . . . administrative remedies when they are available and counsel believes that they may prove successful." 107 S. Ct. at 341 (quoting Webb v. Board of Educ., 471 U.S. 234, 241 n.15 (1985)). The Court offered no empirical evidence in support of its generalization. It is an equally plausible generalization that counsel will forgo these administrative remedies. *See Crest Street*, 107 S. Ct. at 345–46 (Brennan, J., dissenting).

68. *See, e.g.*, Florida Trailer & Equip. Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960) ("[T]he policy of the law [is] generally to encourage settlements.").

69. *See* Evans v. Jeff D., 106 S. Ct. at 1554 n.15 (Brennan, J., dissenting) ("By lessening docket congestion, settlements make it possible for the judicial system to operate more efficiently and more fairly while affording plaintiffs an opportunity to obtain relief at an earlier time. These benefits accrue when settlements are reached in noncivil rights cases no less than in civil rights cases.").

The legislative history of Section 1988 indicates that Congress was concerned about time constraints on courts which might prevent them from being able to consider many civil rights cases. Thus, "[a] 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion." H. R. REP. No. 1558, *supra* note 11, at 7. Awarding attorney's fees to parties who vindicate civil rights informally is also consistent with Congress' goal to foster the private enforcement of civil rights laws, *Id.* at 1, and with the "private attorney general" theory. *See supra* note 7.

The Court in *Crest Street* sought to de-emphasize the problem but offered no concrete solutions. *Crest Street*, 107 S. Ct. at 341.

3. *Erroneous Paraphrase of Section 1988*

The Court grounded its conclusion that only a court hearing a substantive civil rights claim can award attorney's fees in an erroneous paraphrasing of Section 1988. The Court stated that "IN *THE* ACTION OR PROCEEDING" to enforce civil rights the court may award attorney's fees.[70] This paraphrasing links a court's award of attorney's fees to consideration of the merits of the civil rights violation by the same court in the same action or proceeding. The text of Section 1988, however, states that in "*any* action or proceeding" to enforce civil rights the court may award attorney's fees.[71] Thus, the statute does not necessarily contemplate the procedural linking of a court's award of attorney's fees with the same court's enforcement of civil rights. Although the Court's substitution of the word "the" for the word "any" supports the holding in *Crest Street,* Section 1988 is not so written.

The erroneous paraphrasing of Section 1988 illustrates the problems associated with an exclusive focus upon the permissibility of an independent action under Section 1988. The text of Section 1988 is silent on the matter of actions to collect attorney's fees following an out-of-court vindication of civil rights. In analyzing whether or not plaintiffs may assert such actions, the Court in *Crest Street* could have undertaken the inquiry mandated by the wording and the legislative history of Section 1988 and inquired whether the Council was a prevailing party and whether the Council's legal work was performed in an action or proceeding to enforce civil rights. If the Court had analyzed the issues presented in *Crest Street* in this manner, it could have addressed the administrative negotiations issue and decided the case based on substance instead of procedure.

B. *Failure To Address the Administrative Negotiations Issue*

The procedural barrier to independent actions for attorney's fees under Section 1988 imposed by the Court in *Crest Street* prevents consideration of the nature and merits of efforts to gain administrative relief for civil rights violations prior to filing a court action. If administrative proceedings, and the negotiations which are a part of such proceedings, are "proceedings to enforce civil rights" within the meaning of Section 1988, then a claimant who prevails at the administrative level fulfills all of the requirements of that section.[72] Because the Section empowers only courts

70. *Crest Street,* 107 S.Ct. at 340 (emphasis in the original, additional emphasis added).
71. 42 U.S.C. § 1988 (1981).
72. *See supra* note 2 for text of the amendment to Section 1988.

to award attorney's fees, plaintiffs who prevail in administrative proceedings *must* file a subsequent action to recover fees. The holding in *Crest Street* therefore effectively shields an entire class of cases from Congress' intent to make Section 1988 attorney's fees available to as many claimants as possible. The result is inequitable treatment of claimants who obtain positive results at the administrative level.

1. The Language of Section 1988 Allows for Attorney's Fees When the Claimant Prevails in Administrative Proceedings

Under the Supreme Court's reasoning in *Crest Street,* administrative proceedings in the absence of a complaint filed in court are not "proceedings" within the meaning of Section 1988.[73] This interpretation of Section 1988 is not mandated by the wording of the statute.[74] Furthermore, the Court has previously reasoned that the use of the disjunctive phrase "action *or* proceeding" in Section 1988 indicated Congress' general intent to award attorney's fees for work done in administrative proceedings.[75] Because the statute authorizes fee awards to prevailing parties in "actions" *or* "proceedings," the two terms must have different meanings; otherwise, the use of both terms is redundant.[76] By limiting the compensability of time spent in pursuing administrative relief to cases where plaintiffs also file complaints in court, the Court effectively allows awards of attorney's fees only in proceedings undertaken in conjunction with court actions. Congress did not so write Section 1988. Case law supports the proposition that civil rights claimants are considered "prevailing parties" when they vindicate civil rights at the administrative level.[77] Thus, no basis exists for the Court's

73. *See supra* notes 61–4 and accompanying text.

74. See *supra* note 2 for text of the amendment to Section 1988.

75. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 61 (1980).

76. Redundancy in statutory interpretation should be avoided. *See* Rockbridge v. Lincoln, 449 F.2d 567, 571 (9th Cir. 1971).

The term "actions" generally refers to court actions. *See, e.g.,* Pathman Constr. Co. v. Knox County Hosp. Ass'n, 164 Ind. 121, 326 N.E.2d 844, 854 (1975) ("The term 'action' in its usual sense, at least in its usual legal sense, means a suit brought in court, a formal complaint within the jurisdiction of a court of law."). The term "proceedings" refers to "steps before [an] agency which are juridical or administrative in nature" as well as "the investigative and adjudicative functions of a department or agency." United States v. Fruchtman, 421 F.2d 1019, 1021 (6th Cir.), *cert. denied,* 400 U.S. 849 (1970).

In addition to considering the wording and internal construction of a statute, courts may also look to the policy behind the statute to determine the meaning of particular words or phrases. *E.g.,* Richards v. United States, 369 U.S. 1, 11 (1962); United States v. The Heirs of Boisdore, 49 U.S. (8 How.) 113, 122 (1850) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."). Congress intended that claimants be eligible for awards of attorney's fees when they prevailed at the administrative level. *See* H. R. REP. NO. 1558, *supra* note 11, at 7.

77. *See, e.g.,* Maher v. Gagne, 448 U.S. 122, 129 (1980) ("The fact that respondent prevailed

ruling precluding plaintiffs from obtaining attorney's fees when they prevail at that level, without having to resort to filing a complaint in court.

2. *Administrative Negotiations Are a Part of the Administrative Proceedings*

Negotiations subsequent to the filing of an administrative complaint are a component of the administrative enforcement mechanism and a litigation tool used by counsel in representing civil rights clients.[78] They are not independent of the procedure for enforcing civil rights.[79] Thus, in considering whether the negotiations by themselves are proceedings to enforce civil rights, the court must consider whether the administrative proceedings to which the negotiations relate are proceedings to enforce civil rights. If administrative proceedings are proceedings to enforce civil rights, and a party achieves significant enough relief by virtue of negotiations pursuant to the proceedings to be a prevailing party, then the party has met all the requirements for an award of attorney's fees under Section 1988. This conclusion holds true even in the absence of a complaint filed in court; such a complaint is required by neither the wording of nor the congressional intent behind Section 1988.[80]

3. *Inequitable Consequences of Disallowing Attorney's Fees When Claimants Prevail Through Administrative Negotiations*

The Court's reasoning results in the anomalous situation of denying an award to a complainant who succedeed totally at the administrative level while allowing an award for claimants who failed at that level.[81] Under the

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through settlement rather than through litigation does not weaken her claim to fees."); Hanrahan v. Hampton, 446 U.S. 754, 756–57 (1980); Coen v. Harrison County School Bd., 638 F.2d 24, 26 (5th Cir. Unit A Feb. 1981), *cert. denied*, 455 U.S. 938 (1982) (the plaintiff prevailed for purposes of Section 1988 when the school board granted the relief he sought; "[i]t is undisputed that a plaintiff need not obtain formal relief in adversary proceedings to be a prevailing party for purposes of § 1988 . . . .").

78. This Note is limited to an analysis of the compensability of work done by counsel subsequent to the filing of an administrative complaint; it does not address the issue of whether attorney's fees under Section 1988 would be available where counsel's client obtained relief through negotiations and settlement where no administrative complaint has been filed.

79. The importance of administrative negotiations to the agency may be emphasized by noting that the D.O.T. instructed the N.C.D.O.T. to attempt to negotiate a resolution to the dispute embodied in the Council's complaint. *See supra* note 38 and accompanying text.

80. *See supra* notes 61–64 and accompanying text.

81. *See* Blow v. Lascaris, 523 F. Supp. 913, 917 (N.D.N.Y. 1981), *aff'd*, 668 F.2d 670 (2d Cir.), *cert. denied*, 459 U.S. 914 (1982) ("[U]nfairness may result as complainants with meritorious claims who succeed in . . . administrative proceedings are denied any possible action for attorney's fees in federal court, while those claimants with equally or less meritorious claims who lose in administrative proceedings but happen to prevail in federal court are granted attorney's fees.").

approach adopted by the Court in *Crest Street,* if a plaintiff obtains full relief at the administrative level and then files an action to recover attorney's fees, the court will disallow the action.[82] If a plaintiff loses at the administrative level and then files suit in district court, however, he will be eligible for an award of attorney fees for the discrete portion of the administrative proceedings which advanced the issue to the stage of litigation, as long as he prevails in district court.[83]

The facts of *Crest Street* highlight the inequity of the Court's reasoning. There, D.O.T. regulations invited persons who believed themselves to be the victims of discrimination to file administrative complaints, although this was not a mandatory prerequisite to a court action against the D.O.T.[84] The Council did so, and the D.O.T. instructed the N.C.D.O.T. to engage the Council in extensive negotiations. The Court's reasoning penalizes the Council for its adherence to this procedure; the 12,000 hours of preparation time behind these negotiations went completely uncompensated.[85] This directly contravenes Congress' clear intent not to penalize parties for pursuing out-of-court solutions to civil rights violations.[86]

IV. PROPOSAL FOR A RESULT-ORIENTED APPROACH TOWARD AWARDS OF FEES FOR ADMINISTRATIVE RELIEF

Conditioning the award of attorney's fees on claimants' seeking relief for civil rights violations in federal court shifts the focus away from the actual inquiry mandated by the wording of Section 1988: whether administrative proceedings are proceedings to enforce civil rights? Courts should answer this question not by analyzing the relationship of the proceeding to a court action. Instead, courts should examine the results a claimant may obtain in an administrative proceeding. Such an analysis would be consistent with Congress' express intent to promote the vigilant enforcement of civil rights regardless of the forum in which those rights are vindicated.[87]

82. This result is a function of both the Court's prohibition of independent actions to collect Section 1988 attorney's fees, *supra* notes 50–53 and accompanying text, and of the Court's evaluation of administrative proceedings, *supra* notes 73–74 and accompanying text.

83. *See, e.g.,* Webb v. Board of Educ., 471 U.S. 234, 243 (1985) (attorney's fees might have been awarded if the petitioner had made a showing that "any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement").

84. *Crest Street,* 107 S. Ct. at 338.

85. *Id.* at 342. The result in *Crest Street* would have been the same if the Court had applied the reasoning it used in *Webb. See supra* note 21 and accompanying text. The Court's holding in *Webb* is, however, subject to criticism. *See infra* notes 94–96 and accompanying text.

86. *See* H. R. REP NO. 1558, *supra* note 11, at 7 ("A 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion.").

87. *Id.* at 7.

The Supreme Court has devised a result-oriented test for the awarding of attorney's fees in administrative proceedings.[88] Because the Court interpreted Section 1988 to require that civil rights victims must file a court action alleging civil rights violations to receive compensation for work done at the administrative level,[89] the *Crest Street* Court did not apply this result-oriented test. Application of this test to the facts of *Crest Street,* however, shows that the results obtained by the Council as a result of the administrative negotiations would support an award of attorney's fees under Section 1988.

A. *A Two-Part Approach for Awarding Attorney's Fees Under Section 1988*

1. *The Court's Result-Oriented Test*

In *Pennsylvania v. Delaware Valley Citizens' Council,*[90] a Clean Air Act case, the Court awarded attorney's fees for administrative proceedings *after* the entry of a consent decree. The Court reasoned that because the work done by counsel was "necessary to the attainment of adequate relief" to the client an award of attorney's fees was appropriate.[91]

Although the *Delaware Valley* test properly focuses on the results obtained by the claimant at the administrative level, courts applying the test must address two central issues. First, courts might have difficulty in

88. *See infra* notes 90–100 and accompanying text.

89. *See supra* notes 50–53 and accompanying text.

90. 106 S. Ct. 3088 (1986). The litigation in *Delaware Valley* was pursuant to the Clean Air Act, 42 U.S.C. §§ 7401, 7410, 7604(d) (1982). The Act's attorney's fees provision is Section 7604(d), which provides that "the court . . . in any action . . . may award costs of litigation (including reasonable attorney fees . . .)." Section 7604(d) differs from Section 1988 primarily in that the former makes no explicit provision for an award of attorney's fees for work done in administrative proceedings. Nevertheless, the Court in *Delaware Valley* awarded attorney's fees for such work. *Delaware Valley,* 106 S. Ct. at 3096. Where the statute authorizing fee awards *specifically permits* such awards for work done in proceedings, as Section 1988 does, a fee award is proper. Indeed, the Court in *Delaware Valley* noted that "the purposes behind both [§ 7604(d)] and § 1988 are nearly identical, which lends credence to the idea that they should be interpreted in a similar manner." *Id.* at 3095.

91. *Delaware Valley,* 106 S. Ct. at 3094.

The Supreme Court also used a result-oriented test in Webb v. Board of Educ. of Dyer County, 471 U.S. 234 (1985). In *Webb* the Court used the "integral function" test to determine whether a claimant was entitled to fees for work done in administrative proceedings. The Court asked whether the proceedings were integral to the enforcement of the cause of action embodied in Section 1983. *Id.* at 240–41.

The Court's analysis of whether a proceeding performed an "integral function" hinged on whether the substantive civil rights law stipulates that claimants must follow certain administrative procedures. *Id.* 240–41. The Court noted that since Section 1983 had no administrative exhaustion requirement claimants could go directly to court to seek redress for grievances under Section 1983. *Id.* 240–41. *See also* Patsy v. Florida Bd. of Regents, 457 U.S. 496, 516 (1982) (no exhaustion requirement for Section 1983).

interpreting the term "necessary."[92] It would be inconsistent with both the *Delaware Valley* result and with Congress' goal of facilitating settlement of civil rights claims to construe the word "necessary" to mean "mandatory."[93] Rather, courts could construe what is "necessary" in terms of the actual work performed. A court should ask first, whether the proceeding is appropriate to obtain adequate relief; and second, whether the work performed was necessary to obtain the relief sought by the proceeding. Thus, the focus would be on the results of the efforts expended to obtain relief instead of on the technical form of the procedure used by the claimant.

Although the Court in *Webb v. Board of Education*[94] declined to award attorney's fees for work done in optional administrative proceedings, its holding overlooked the fact that the interests served by vigorous representation at an optional administrative proceeding are the same as those served by representation at mandatory administrative proceedings.[95] The Court's assertion that optional administrative proceedings do not perform an integral function in the enforcement of civil rights[96] is the product of circular reasoning: the proceedings will cease to have an effect if they become dormant due to the disincentives civil rights claimants have to use them. That the optional proceedings exist is strong proof that they were intended to be used. A result-oriented test embracing both mandatory and optional administrative proceedings would be consistent with congressional intent to facilitate private enforcement of civil rights laws.

The second part of the *Delaware Valley* test examines the adequacy of the relief obtained. An evaluation of the adequacy of relief obtained by the

92. There is an ample body of precedent, beginning with McCullough v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), to assist courts in this endeavor.

93. *See also id.* at 414:

> It is essential to just construction, that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison . . . .

94. 471 U.S. 234, 244 (1985). The Court rejected the plaintiff's claim for attorney's fees for time spent in pursuing optional administrative remedies despite the fact that the plaintiff had previously filed a motion alleging violations of 42 U.S.C. § 1983. The Court distinguished *Webb* from New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980), in which the Court held that where the underlying civil rights statute [Title VII] required claimants to exhaust state-level administrative remedies prior to filing suit, a fee award for such work would be proper. The *Webb* Court reasoned that, unlike Title VII, Section 1983 had no administrative exhaustion requirement and instead stood as an independent avenue of relief which the plaintiff could go straight to court to assert. *Webb*, 471 U.S. at 241. The Court concluded that since the administrative remedies did not serve an integral function in the enforcement of Section 1983 that they did not give rise to an award of attorney's fees. *Id.* at 241. *See also supra* notes 19–21 and accompanying text.

95. *See* Ciechon v. City of Chicago, 686 F.2d 511, 525 (7th Cir. 1982).

96. *Webb*, 471 U.S. at 241.

claimant at the administrative level is not a difficult task. In a formal court action, plaintiffs indicate what they seek in the form of a complaint;[97] the court measures their success by reference to the relief prayed for.[98] An administrative complaint serves an analogous function.[99] It provides a court with a standard by which the court can measure the adequacy of the relief obtained by the claimant. A court's inquiry will be the same as that which it already undertakes to determine whether to award fees in court actions to enforce civil rights under Section 1988.[100]

2. *Determining Whether the Relief Was Obtained as a Result of a Civil Rights Violation*

While the *Delaware Valley* test is well suited for assessing the degree of relief obtained by civil rights claimants in administrative forums, the test is less well suited for judging whether the proceeding was one to enforce civil rights. Moreover, a test focusing exclusively on the results obtained by claimants is potentially prejudicial to defendants, because a fee award under Section 1988 is improper unless it can be shown that the defendant violated a civil rights law.[101]

Another result-oriented test, the "catalyst" test, provides a solution to the problem of how courts can ascertain whether the defendant violated a civil rights law. The "catalyst" test has enjoyed favor in the lower federal

97. *See* FED. R. CIV. P. 8(a)(2) (complaint must allege "a short and plain statement of the claim showing that the pleader is entitled to relief"); J. FRIENDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 274 (1985).

98. *See* Comment, *Civil Rights Attorney's Fees Awards in Moot Cases*, 49 U. CHI. L. REV. 819, 831–32 (1982) ("Satisfaction of the requirement that the plaintiff achieve substantive relief must be determined with reference to the relief prayed for.").

99. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8.04 (1958).

100. The Court in Pennsylvania v. Delaware Valley Citizens' Council, 106 S. Ct. 3088, 3097–98 (1986), noted that courts traditionally take into account the plaintiff's degree of success in calculating the amount of an award. The Court in Hensley v. Eckerhart, 461 U.S. 424, 435 (1983), stressed that the most critical factor in determining the amount of the fee award was the degree of success obtained, and that "[t]he result is what matters." *But see* Blum v. Stenson, 465 U.S. 886 (1984). In *Blum*, the Court suggested a more mechanical method for calculating the amount of an attorney fee award. A reasonable attorney's fee can be computed by multiplying "the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Id.* at 888. Although the fee award may in rare cases be adjusted upwards, the court noted that the results obtained would be fully reflected in the calculation of a reasonable fee. *Id.* at 900. Thus, a court calculating a fee award need not separately consider the degree of success; instead, the court must only determine what is a reasonable fee and the amount of time counsel reasonably spent representing the client in the administrative proceedings.

101. *See, e.g.*, Hennigan v. Ouachita Parish School Bd., 749 F.2d 1148, 1153 (5th Cir. 1985) (where a plaintiff's action "has no colorable, or even reasonable, likelihood of success on the merits" the plaintiff is not entitled to an award of attorney's fees). *See also* Dobbs, *Awarding Attorney's Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 451 (1986).

courts[102] but has not yet been adopted by the Supreme Court. The "catalyst" test has two prongs. First, plaintiffs must show that their suits caused the defendant to alter its policies or to grant some sort of preliminary relief.[103] It is not necessary for plaintiffs to prevail in a judgment on the merits to be eligible for an award of attorney's fees.[104] Second, plaintiffs must show that they had a legitimate civil rights claim entitling them to the relief they sought and obtained.[105] Plaintiffs can make this showing by referring to the administrative record,[106] the timing of the settlement,[107]

102. *See, e.g.*, Robinson v. Kimbrough, 652 F.2d 458 (5th Cir. Aug. 1981); Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981); Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978). *See generally* E. LARSON, *supra* note 56, at 68.

103. *See Nadeau*, 581 F.2d at 281 (a fee award is justified if the plaintiffs suit was a "necessary and important factor" in achieving the relief the plaintiff sought even though the defendants voluntarily altered the offensive behavior).

104. *See, e.g., Robinson*, 652 F.2d 458 (plaintiff's lawsuit spurred the county jury commissioner to "voluntarily" increase the percentage of blacks and women on county jury lists; plaintiffs were therefore prevailing parties and entitled to an award of attorney's fees); Armstrong v. Reed, 462 F. Supp. 496 (N.D. Miss. 1978) (plaintiffs were prevailing parties although their action had been mooted when the state legislature amended a statute in accordance with the relief the plaintiffs sought).

The "catalyst" test has heretofore only been applied to instances where the filing of a lawsuit by the plaintiff caused the defendant to alter the offending behavior. Because the test focuses on the relationship between the plaintiff's efforts and the result obtained by those efforts, it should apply with equal logic to instances where the plaintiff's administrative complaint, and negotiations pursuant to the complaint, cause the defendant to grant at least some of the relief prayed for.

105. *See Nadeau*, 581 F.2d at 281 ("If it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense."); H. R. REP. NO. 1558, *supra* note 11, at 7. See also Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 427–29 (8th Cir. 1970), where the court determined that Southwestern Bell's hiring practices were discriminatory and that because the plaintiff's lawsuit "acted as a catalyst which prompted [the company] to take action implementing its own fair employment practices" an award of attorney's fees was proper. *Parham* is significant not only because it is among the first cases to formally enunciate the catalyst test, but also because Congress referred to it to support the proposition that civil rights claimants need not obtain formal relief in order to be eligible for an award of attorney's fees under Section 1988.

106. *See, e.g.*, NAACP v. Wilmington Medical Center, Inc, 689 F.2d 1161, 1163 (3d Cir. 1982), *cert. denied*, 460 U.S. 1052 (1983) (the administrative record showed that the U.S. Department of Health, Education and Welfare violated the plantiff's civil rights).

As a general proposition, courts should decide questions of law but should limit their review of the agency's fact finding to a determination of whether the agency's conclusions are reasonable and within the permissible range of discretion. K. DAVIS, ADMINISTRATIVE LAW TEXT 525 (1972). Thus, where the claimant has thoroughly developed his case at the administrative level and the agency has granted at least part of the relief sought, the agency's actions create a strong inference that the claimant's civil rights allegations were legitimate. When the agency admits that it violated a civil rights law, as the N.C.D.O.T. did in *Crest Street*, 107 S. Ct. at 339, the court need not inquire into the legitimacy of the plaintiff's civil rights claim. *See infra* notes 112–13 and accompanying text.

107. *See, e.g., Robinson*, 652 F.2d at 466 (the chronology of events shows that the defendant acted to avoid litigating the "serious" constitutional claims raised by the plaintiff); Westfall v. Board of Comm's of Clayton County, 477 F. Supp. 862, 868 (N.D. Ga. 1979) (the plaintiff was entitled to an award of fees because, in light of the sequence of events, the defendants modified their behavior as a direct result of the complaint).

and the results obtained from the agency.[108] The Supreme Court could combine this aspect of the "catalyst" test with the result-oriented test it has already devised in order to create a single test which both protects civil rights defendants and promotes the vindication of civil rights through out-of-court settlements.

B. Application of the Result-Oriented Test to Crest Street

Had the Court in *Crest Street* applied the "necessary for the attainment of adequate relief" test as outlined above it would have found that the administrative proceedings in which the Council engaged were compensable. The Court acknowledged that the 12,000 hours of work done by counsel in the case, most of which was associated with the administrative negotiations, yielded substantial results.[109] As a result of the Council's efforts, N.C.D.O.T. drastically modified its original highway routing plans; the Crest Street neighborhood was not destroyed by the road.[110] The relief obtained by the Council was clearly adequate. The administrative proceedings were also necessary to the attainment of that relief. If the Council had not opposed N.C.D.O.T. in the administrative forum, it is reasonable to assume that N.C.D.O.T. would have constructed the highway as planned through the Crest Street neighborhood. That the Council could have gone to court to assert its claims does not make the administrative relief it decided to pursue less appropriate or effective.[111] To deny attorney's fees to claimants who vindicate their civil rights out of court, simply because a court action was available, is to fail to give effect to Congress' intention to promote informal resolution of civil rights disputes and to elevate the form of the proceeding over the results obtained by the claimant.

The Court in *Crest Street* could have easily ascertained whether the Council had a legitimate civil rights claim. In *Crest Street,* the agency admitted it violated Title VI of the Civil Rights Act of 1964.[112] Where the

108. Some courts focus exclusively on the results obtained by the claimant in determining whether a fee award under Section 1988 is proper. *See, e.g.,* Bagby v. Beal, 606 F.2d 411, 415 (3d Cir. 1979) (whether the claimant is entitled to fees hinges entirely on whether he is a prevailing party; the court should focus "not on the substantive merits of the plaintiff's claims, but rather on the relief ultimately received by the plaintiff"); Massachusetts Fair Share v. O'Keefe, 476 F. Supp. 294, 297–98 (D. Mass. 1979) (the critical factor is the outcome of the dispute and the defendant's denial of liability is irrelevant).

109. *See supra* notes 45–46 and accompanying text.

110. *See supra* note 42 and accompanying text.

111. Administrative resolution of civil rights disputes should be encouraged. *See supra* notes 67–69 and accompanying text.

112. *Crest Street,* 107 S. Ct. at 338.

agency admits its conduct was culpable under one of the civil rights statutes listed in Section 1988, the court need not inquire into the legitimacy of the claimants' civil rights grievance; the defendant's admission constitutes a waiver of that defense.[113]

Even if the agency in *Crest Street* had not admitted any wrongdoing, the court could have evaluated the plaintiff's claim to see if it was legitimate.[114] This inquiry would not have been difficult because it would have been little different from analyses which judges make on a regular basis.[115] Although a determination of what constitutes adequate proof would have been necessary,[116] one commentator has suggested that the courts employ the same test used to evaluate a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).[117] At least one court has suggested that fees should be denied only where the plaintiff's claims were frivilous, groundless, or unreasonable.[118] As a third approach, a court could inquire into the claimant's chances for success on the merits in order to determine if a fee award is proper.[119]

It may be unfair to award attorney's fees against a party who has not had an opportunity to prove that he was in the right.[120] Nevertheless, any court determining fees must look into the merits of the plaintiff's claim in order to ascertain whether the plaintiff is a prevailing party for the purposes of Section 1988.[121] Furthermore, the defendant can be said to have waived the

113. *See* J. FRIEDENTHAL, *supra* note 97, at 283 (an admission in a defendant's answer will bind him at trial and will obviate any need of the plaintiff to offer proof on the matters admitted). Pleadings in an administrative proceeding are governed by the same notions of fairness. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 196 (1972) ("The fundamental purpose of pleading is to let each party know the others' position so that each can properly prepare.").

114. *See supra* notes 105–08 and accompanying text.

115. *Id.*

116. *Id.*

117. *See* Comment, *supra* note 98, at 837–38. FED. R. CIV. P. 12(b)(6) provides for defense of "failure to state a claim upon which relief can be granted."

118. *See* Nadeau v. Helgemoe, 581 F.2d 275, 281 (1st Cir. 1978) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978)). This is a generous standard which does not impose any significant limitations on fee awards. *See* Comment, *supra* note 98, at 836. A court awarding fees could look at extrinsic factors to help it determine if the civil rights claim was legitimate. *See supra* notes 105–08 and accompanying text.

119. *See* Cicero v. Olgiati, 473 F. Supp. 653 (S.D.N.Y. 1979). The district court in *Cicero* denied the application for fees because it reasoned that recent Supreme Court decisions raised "a substantial question as to whether the complaint . . . can . . . be considered to state a valid claim." *Id.* at 655.

120. *See* Alioto v. Williams, 450 U.S. 1012, 1013–14 (1981) (Rehnquist, J., dissenting from denial of certiorari).

121. *See, e.g.*, White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 451–52 (1982); Williams v. Alioto, 625 F.2d 845, 848 (9th Cir. 1980), *cert. denied*, 450 U.S. 1012 (1981) ("Claims for attorneys' fees ancillary to the case survive independently . . . and may be heard even though the underlying case has become moot.").

privilege of a full trial on the merits by voluntarily settling with the claimant.[122] Courts could maintain a reasonable assurance of fairness while at the same time following the mandate of Section 1988: that defendants shoulder the attorney's fees of plaintiffs who vindicate civil rights through administrative proceedings.

V. CONCLUSION

Recent Supreme Court interpretation of Section 1988 has diluted the effectiveness of its fee-shifting provisions. The Court's decision in *North Carolina Department of Transportation v. Crest Street Community Council* not to permit actions brought solely to assert a claim for attorney's fees is squarely in line with this recent precedent. It is not, however, squarely in line with either the wording of Section 1988 or the congressional intent behind the attorney's fees provision.

The Court in *Crest Street* argued that the procedural steps which claimants invoked to assert civil rights grievances were the determinative factor in deciding whether a fee award would be proper. It did not address the more important question of whether negotiations subsequent and pursuant to the initiation of an administrative complaint are "proceedings to enforce civil rights" within the meaning of Section 1988. By imposing a new procedural prerequisite on the award of attorney's fees under Section 1988, the Court in *Crest Street* severely limits the ability of the attorney's fees provision of Section 1988 to perform the vital function in the private enforcement of civil rights laws that Congress intended the section to have. Congress hoped that the fee-shifting provisions of Section 1988 would attract counsel to take on civil rights cases, thus ensuring that those without the financial resources to engage competent counsel will not be excluded from the protection offered by these laws. Absent vigorous enforcement, the United States' civil rights laws will become hollow pronouncements.

In interpreting Section 1988, the Court should concentrate on the results obtained by civil rights claimants; not on the procedural steps invoked to achieve these results. This approach fosters the enforcement of civil rights both in formal court actions and in administrative proceedings, and is faithful to Congress' intent to provide attorney's fees to as broad a range of claimants as possible. In addition, a result-oriented approach to the awarding of Section 1988 attorney's fees is not a novel concept; the Supreme Court has already developed a test for the awarding of attorney's fees which

122. *See e.g.*, Priem v. Shires, 697 S.W.2d 860, 863 n.3 (Tex. App. 1985) (the term settlement "refers to the *conclusion* of a disputed . . . claim, and attendant differences between the parties, through a contract in which they agree to mutual concessions *in order to avoid resolving their controversy through a course of litigation*") (emphasis added).

looks to the results obtained by the claimant. Elimination of the procedural constraint imposed by *Crest Street* would create an opportunity to apply this test to both court actions and administrative proceedings in a way that is consistent with Congress' goals for Section 1988.

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